

2003

Thurston Cable Construction and/or Freemont Comp. v. Labor Commission of Utah and Kirk S. Demille : Brief of Appellee

Utah Court of Appeals

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Recommended Citation

Brief of Appellee, *Thurston Cable Construction v. Labor Commission of Utah*, No. 20030532 (Utah Court of Appeals, 2003).
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IN THE UTAH COURT OF APPEALS

THURSTON CABLE CONSTRUCTION
and/or FREEMONT COMP.

Petitioner/Appellant

v.

LABOR COMMISSION OF UTAH
and KIRK S. DEMILLE,

Respondents/Appellees

Case No.20030532-CA

Labor Commission No.00-1059

Priority No. 7

BRIEF OF RESPONDENT KIRK S. DEMILLE

PETITION FOR REVIEW FROM ORDER OF THE UTAH LABOR COMMISSION

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**RESPONDENTS RESPECTFULLY REQUEST ORAL ARGUMENT
AND THAT THIS CASE BE REPORTED.**

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JURISDICTION OF THE COURT

This appellate review proceeding arises from the Utah Labor Commission's May 30, 2003 tentative finding that the Respondent Kirk S. DeMille is permanently and totally disabled. The Utah Court of Appeals jurisdiction to hear this case is disputed; however, if this Court does have jurisdiction it arises pursuant to Utah Code Annotated § 78-2a-3 (2) (a) (1953, as amended), Utah Code Annotated § 34A-2-801 (8) (1997) and Rule 14 of the Utah Rules of Appellate Procedure.

STATEMENT OF ISSUES AND STANDARD OF REVIEW

Issue 1: Does the Court of Appeals have jurisdiction to review this appeal?

Standard of Review: This is a question of law where appellate review is under a "correctness" standard with no deference to the agency's determination, because the appellate court has the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction. Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah 1997). Utah Administrative Procedures Act, Utah Code Annotated, § 63-46b-16(4)(d) (1988).

Issue 2: Did the Utah Labor Commission correctly determine that Mr. DeMille has a "significant impairment under Utah Code Annotated § 34A-2-413 (1997).

Standard of Review: This is a question of law as it involves a matter of statutory interpretation. Appellate review is under a "correctness" standard with no deference to the agency's determination, because the appellate court has the power and duty to say what the law is and to ensure that it is uniform throughout the

jurisdiction. Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah 1997). Utah Administrative Procedures Act, Utah Code Annotated, § 63-46b-16(4)(d) (1988).

The Utah State Legislature has granted the Labor Commission “the full power, jurisdiction, and authority to determine the facts and apply the law. . .” to any adjudicative proceeding before it. Utah Code Ann. §34A-1-301 (1997). When “the governing statute makes an explicit grant of discretion to [an agency, the appellate court] appl[ies] a reasonableness and rationality standard, and may only overturn the [agency’s] conclusions of law if they are unreasonable and irrational.” Bernard v. Motor Vehicle Division, 905 P.2d 317, 320 (Utah App. 1995).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. E.g., State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984); and McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

Issue 3: Did the Utah Labor Commission correctly determine that Mr. DeMille September 14, 1995 industrial accident was the “direct cause” of his permanent total disability under Utah Code Annotated § 34A-2-413?

Standard of Review: This involves a mixed question. The interpretation of the term “direct causation” is a matter of statutory interpretation, which is reviewed under a “correctness” standard with no deference to the agency’s determination,

because the appellate court has the power and duty to say what the law is and to ensure that it is uniform throughout the jurisdiction. Drake v. Industrial Commission, 939 P.2d 177, 182 (Utah 1997). Utah Administrative Procedures Act, Utah Code Annotated, § 63-46b-16(4)(d) (1988).

Review of the Commission's underlying factual findings regarding direct causation is reviewed under the substantial evidence standard. Chase v. Industrial Commission, 872 P.2d 475 (Utah App. 1994).

As in issue 2 above, the statute is to be liberally construed and any doubt as to compensation is to be resolved in favor of the Petitioner. E.g., State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984); and McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

Issue 4: Did Mr. DeMille meet his burden of proving that his industrial accident at Thurston Cable is the medical cause of his low back condition?

Standard of Review: This is a mixed question of law and fact to which this Court extends "heightened deference" to the Commission's determination "with varying degrees of strictness, falling anywhere between a review of 'correctness and a broad 'abuse of discretion' standard." Drake v. Industrial Commission, 939 P.2d 182 (Utah 1977).

Furthermore, in reviewing the proceedings below and the scope of the Utah Workers Compensation Act, it is important to recognize that the Act is to be liberally construed and any doubt as to compensation is to be resolved in favor of the

Petitioner. E.g., State Tax Commission v. Industrial Commission, 685 P.2d 1051, 1053 (Utah 1984); and McPhie v. Industrial Commission, 567 P.2d 153, 155 (Utah 1977).

Preservation for Appeal: All of the above issues were raised by Petitioner before the Utah Labor Commission with the exception of whether this Court has subject matter jurisdiction. A Petition for Review was timely filed with this Court.

DETERMINATIVE STATUTE AND RULE

Utah Code Annotated §34A-2-413 (1997) is the applicable permanent total disability statute, and R612-1-10 of the Utah Administrative Code is the applicable Permanent Total Disability Rule. R612-1-10(C)(1)(c) is the applicable Rule as to “finality” of Labor Commission Orders. The Statutes and Rules are set forth in full in Addendum “A” hereto.

STATEMENT OF THE CASE

Nature of the Case: The Petitioners seek review of the Utah Labor Commission’s Order tentatively finding Mr. DeMille permanently and totally disabled as a result of work related injuries.

Course of Proceedings: Mr. DeMille filed an Application for Permanent Total Disability benefits sustained as the result of an industrial injury on September 14, 1995. (R1 at 19). The Employer and its workers compensation Carrier filed an Answer to the Application on April 30, 1999. (R1 at 40-43) and an Amended Answer on September 7, 1999 (R1 at 47-48). Notice of Hearing was sent to all parties on

February 12, 2001 setting Mr. DeMille's claim for Hearing on April 4, 2001. (R1 at 48). The Hearing was subsequently continued and after further discovery proceedings were conducted, a new Notice of Formal Hearing setting the claim for Hearing on April 3, 2001 was sent to all parties. (R1 at 53).

On November 6, 2002 Administrative Law Judge Richard M. La Jeunesse entered his Findings of Fact, Conclusions of Law and Order granting Petitioner's claim for permanent total disability benefits. (R1 at 165-181). Addendum "B".

Petitioner filed a Motion for Review with the Utah Labor Commission on December 6, 2002 (R1 at 185-188). The Commission entered an Order Denying Petitioner's Motion for Review on May 30, 2003. (R1 at 222-225). Addendum "C".

A Petition for Review was filed with this Court on June 27, 2003. A Docketing statement was filed on August 5, 2003.

On December 15, 2003 Respondent filed a Motion to Dismiss for Lack of Jurisdiction. Petitioner filed a Response on December 31, 2003 and Mr. DeMille filed a Reply to that Response on January 16, 2004. On January 27, 2004 the Court of Appeals issued an Order deferring the jurisdictional Motion to Dismiss for Briefing.

On March 11, 2004, Respondent filed a Second Motion to Dismiss alleging recently decided authority which further supported its Motion to Dismiss. Petitioner filed a Response and on April 27, 2004 the Court of Appeals again issued an Order deferring the jurisdictional issues.

Statement of Facts: The relevant facts in this matter are simple,

straightforward and not really disputed by the parties. A complete, detailed and largely unchallenged statement of facts is contained in the Findings of Fact, Conclusions of Law and Order of the Administrative Law Judge, dated November 6, 2002 (R1 at 165-181). See also, Addendum “B”. The Commission in its Order Denying Motion for Review dated May 30, 2003, adopted those Findings. (R1 at 222-225); See also, Addendum “C”.

SUMMARY OF ARGUMENT

The Order from which Petitioner seeks appellate review is not a “final” Order which is subject to appellate review. It is a Tentative Finding of Permanent Total Disability and the Administrative Law Judge has not yet fully adjudicated this matter. Petitioner’s Petition for Review is premature and this Court is without jurisdiction to review the Order as it presently stands.

Even if the Order is subject to appellate review, Petitioner has failed to marshal the facts and evidence in support of the Order and the Petition should be dismissed for that reason as well. In any event Respondent did meet his burden to establish that his industrial accident was the direct cause of his present Permanent Total Disability status.

ARGUMENT

I

**INITIAL TENTATIVE FINDINGS OF PERMANENT TOTAL DISABILITY ARE
NOT FINAL APPEALABLE ORDERS.**

Pursuant to Utah Code Ann. §78-2a-3(2)(a), the Utah Court of Appeals has appellate jurisdiction over the Commission's "final" adjudicative Orders. It is acknowledged that the Administrative Law Judge's Order and the Commission's Order on Motion for Review were only "tentative" findings of permanent total disability. On this basis Respondent previously moved this Court to dismiss the Petition for Review as the underlying Order was not a final Order subject to judicial review. The Court reserved the issue directing the parties to Brief it.

On January 30, 2004, three days after that Order was issued by this Court, the Utah Supreme Court issued its decision in the case of Thomas v. Color Country Management, 2004 UT 12, 84 P.3d 1201. That case involved the "finality" of an initial finding of permanent total disability by the Utah Labor Commission and whether such Orders were "final" for the purpose of enforcement and appellate review, the very issue this Court indicated it needed further briefing in order to resolve.

The Supreme Court in Thomas specifically held as follows:

Section 34A-2-413 (6) (a) specifically states that initial findings of permanent total disability are not final. Ibid at 9.

While sections 34A-1-303 and 34A-2-801 of the Labor Code set forth a broad definition of what constitutes a final order, the language of section 34A-2-413 excepts the initial finding of permanent total disability from this broad definition of "final order" by expressly stating that the initial, tentative finding is not final. Ibid at 11.

In this case, like Thomas, only the interim, tentative finding of permanent total

disability has been made. Pursuant to the Utah Supreme Court's recent ruling in Thomas such Orders are not final for purposes of appeal.

Additionally, this Court in Sloan v. Board of Review, 781 P.2d 463, 465 (Utah App. 1989), held that "Because the order reserves something further for the agency to determine, we hold that the order of the commission is not a final appealable order."

In further support of this argument, it should be noted that the Order appealed from in this case had not been designated by the Labor Commission as "final" for purposes of appellate review as such language is conspicuously missing from the Order below. Utah Code Ann. § 63-46b-10 (1)(f) and Utah Code Ann. § 63-46b-12 (6)(c)(vii) (1988) require that final and thus appealable Orders of Administrative Agencies contain language putting the parties on notice that the Order is final and appealable.

Finally, although Utah Administrative Rule 612-1-10(C)(1)(c) does provide that a preliminary determination of permanent total disability is final agency action for purposes of appellate review, that Administrative Rule adopted by the Commission, can not overcome a clearly contrary State statute and a final decision of the Utah Court of Appeal. It is improper rule making and can not serve to confer jurisdiction upon this Court.

Petitioners argue that Utah Administrative Code R612-1-10(c)(1)(c), adopted after the Thomas decision, specifically provides that "preliminary determinations of

after the Thomas decision, specifically provides that “preliminary determinations of permanent total disability by the Labor Commissioner or Appeals Board is a final agency action for purposes of appellate judicial review”. This argument is flawed for several reasons.

First, it is well established that an injured worker, like Petitioner herein, is entitled to the law as it existed at the time of his injury. Kaiser Steel Corp. v. Industrial Commission, 704 P.2d 1168, 1171 f.n.1 (Utah 1985). Utah Const. Co. v. Matheson, 534 P.2d 1238 (Utah 1975). Oakland Construction Co. v. Industrial Commission, 520 P.2d 208 (Utah 1974). Silver King Coalition Mines Co. v. Industrial Commission, 268 P.2d 689, 691 (Utah 1954). Kennecott Corp. v. Industrial Commission, 740 P.2d 305 (Utah App. 1987). Moore v. American Coal Co., 737 P.2d 789 (Utah 1987). Lantham Co. v. Industrial Commission, 717 P.2d 255, 256 at f.n.1 (Utah 1986). The Administrative Rule cited by Petitioners was not in effect at the time of Respondent Kirk DeMillie’s injury or even at the time of the filing of his Application for Hearing.

Second, the Rule is a gross abuse of Administrative Rule Making. Administrative Agencies only have authority to set out procedural directives within their purview. In this case, the definition of what constitutes a “final” Order from the Labor Commission is not a procedural directive. The Utah Legislature, as specifically found in Thomas, stated that “Section 34A-2-413 (6) (a) specifically states that initial findings of permanent total disability are not final.”

through Administrative Rulemaking to overturn a specific Statute adopted by the Utah State Legislature and overrule the Utah Supreme Court in interpreting that Statute. It is at best a blatant attempt by an executive administrative agency, with quasi-judicial authority to overrule the Utah State Legislature and the Utah Supreme Court. The Labor Commission, as an Administrative Agency can not create appellate jurisdiction where it does not otherwise exist.

In Target Trucking v. Labor Commission, 2005 UT App. 70 (February 17, 2005) this Court held that:

The administrative rule conflicts with the statute. An administrative body's rules must conform to, rather than be inconsistent, with statute. See Bradshaw v. Wilkinson Water Co., 2004 UT 38, ¶33, 94 P.3d 242. The rule must, therefore, yield to the statute. An interim order of permanent total disability is not final and appealable until the requirements of Utah Code section 34A-2-413 (6) (b) are met. Id. 71.

This Court has recently issued an opinion in the case of Ameritemps, Inc. v. Labor Commission, 2005 UT App. 491 (November 10, 2005). In that case, the Court found the Labor Commission's "preliminary determination of permanent total disability is a seriatim final agency action, and this court does have subject matter jurisdiction to review it." ¶32. The Court in Ameritemps applied the three-part test in Union Pacific R.R. v. Utah State Tax Commission, 999 P. 2d 17, 21 (Utah 2000), to determine if an agency action is final:

- (1) Has the administrative decision making reached a stage where judicial review will not disrupt the orderly process of adjudication?
- (2) Have rights or obligations been determined or will legal

(2) Have rights or obligations been determined or will legal consequences flow from the agency action?; and

(3) Is the agency action, in whole or in part, not preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action?

A. Orderly Process of Adjudication.

The Court in Ameritemps relies heavily on the fact that the Labor Commission's Order Denying Motion for Review in that case contained statutorily mandated "Notice of Appeal Rights" which indicated that a party could request reconsideration within twenty days of the date of the order, or within thirty days of the date of the Order, Petition this Court for judicial review of the Order.

The Order Denying Motion for Review (R1 at 222-225) in Mr. DeMille's case significantly did not contain the statutorily mandated "Notice of Appeal Rights" because it was not a "final agency action" from which an appeal could be taken. The Labor Commission had issued an Order of Remand to the ALJ "... to complete the adjudication of Mr. DeMille's claim for permanent total disability compensation and also to rule upon the issue of attorneys fees for Mr. DeMille's counsel." (R1 at 224).

Judicial review of this case did in fact disrupt the orderly process of adjudication. Although the Commission had issued an Order of Remand, they unofficially imposed a stay on all proceedings in this matter while the appeal was being taken. No request for stay was made by either party and no bond was ever posted by the Petitioners. Nevertheless, the Labor Commission refused to set the case for further Hearings to "complete the adjudication of Mr. DeMillie's claim for

permanent total disability compensation.”

Additionally, although statutorily mandated subsistence payments had been ordered by the ALJ and the Labor Commission, the Petitioners have not made any payments since filing their Petition for Review in this case over two years ago. By any measure, the appeal in this case of the preliminary determination of Permanent Total Disability has significantly disrupted the orderly process of adjudication.

B. Rights or Obligations Determined.

This Court in Ameritemps found that the second-prong had been met because “the Board had determined that Albert [the injured worker] was permanently totally disabled and also awarded permanent total disability compensation payments to Albert to start immediately.” ¶ 21. The Court quoted with approval Baker v. Utah Pub. Serv. Comm’n, 970 P.2d 702, 706 (Utah 1998) that an agency action was final where “the language of the order makes clear that the [agency] determined obligations of the parties with which the parties must immediately comply.”

The second-prong is not satisfied in this case, because although the Commission directed subsistence benefits to be paid, the Petitioners have never made any such payments, sought a stay on that obligation or posted an Appeal Bond. It is unjust and inequitable for the Petitioners to seek judicial review on the basis of an obligation that they have not paid or sought a stay from. By failing to make the ordered payments while this case was under review, or obtaining an stay on appeal and posting a bond, Petitioners have forfeited the right to invoke this

Court's subject matter jurisdiction on the basis that rights or obligations have been determined in the Order Denying Motion for Review.

In this regard, it is important to note that the Legislature has specifically provided in Utah Code Ann. § 34A-2-413 (6) that:

(a) A finding by the commission of permanent total disability **is not final**, unless otherwise agreed to by the parties, until:

(i) an administrative law judge reviews a summary of reemployment activities undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act;

(ii) the employer or its insurance carrier submits to the administrative law judge:

(A) a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment; or

(B) notice that the employer or its insurance carrier will not submit a plan. (Emphasis added).

By the very terms of the applicable statute the Order Denying Motion for Review/Order of Remand in this case was not a final agency action which could confer subject matter jurisdiction upon this Court.

C. Preliminary, Preparatory, Procedural or Intermediate.

The third-prong requires that the agency action from which the Petition for Review is taken not be preliminary, preparatory, procedural, or intermediate with regard to subsequent agency action. It is impossible to view the Order in this case as anything but preliminary, preparatory and intermediate. The Commission was specific that it was making only a "tentative determination" of permanent total disability. (R1 at 224). Further, the Commission specifically issued an Order of Remand in order "to complete the adjudication of Mr. DeMille's claim," which is

additional evidence that the Order was preliminary and an intermediate step in the permanent total disability process, since the Employer/Carrier would still be given the opportunity to present a reemployment plan which would demonstrate that Mr. DeMille was in fact not permanently totally disabled.

For all of the above reasons, the Order Denying Motion for Review/Order of Remand in this case was not a final agency action from which a Petition for Review could be taken. This Court should decline to exercise subject matter jurisdiction over this case, and remand it back to the Labor Commission for further adjudicative proceedings.

II

MR. DEMILLE SATISFIED HIS BURDEN TO DEMONSTRATE THAT HIS PERMEANT TOTAL DISABILITY STATUS WAS THE DIRECT RESULT OF HIS INDUSTRIAL ACCIDENT.

A. The Facts and the Law are to be Liberally Construed in Favor of Granting Compensation to Injured Workers.

Few principles of workers compensation law are as well established in this State as that workers' compensation disability claims are to be liberally construed in favor of awarding benefits, and any doubts raised from the evidence are to be resolved in favor of the claim. Utah Courts have consistently reiterated this principle from 1919 to the present. Heaton v. Second Injury Fund, 796 P.2d 676 (Utah 1990); J & W Janitorial Co. v. Industrial Commission, 661 P.2d 949 (Utah 1983); Prows v. Industrial Commission, 610 P.2d 1362 (Utah 1980); McPhie v. Industrial Commission, 567 P.2d 153 (Utah 1977); Baker v. Industrial Commission, 405 P.2d

613 (Utah 1965); Askrew v. Industrial Commission, 391 P.2d 302 (Utah 1964); M & K Corp. v. Industrial Commission, 189 P.2d 132 (Utah 1948); and Chandler v. Industrial Commission, 184 P. 1020 (Utah 1919).

The Utah Supreme Court in Chandler, supra, first discussed the proper construction of the Workers' Compensation Act and the underlying purposes of the Act, and stated as follows:

[O]ur statute requires that the statutes of this state are to be 'liberally construed with a view to effect the objects of the statutes and to promote justice.'

* * * * *

In this connection it must be remembered that the compensation provided for in the act is in no sense to be considered as damages for the injured employee or to his dependents in case death supervenes. The right to compensation arises out of the relation existing between employer and employee, and that the injury arises out of [or] in the course of the employment. Under such an act the costs and expenses of conducting the business or enterprise, including compensation for injuries to `employees or other casualties, must be taxed to the business. The theory of the Compensation Act is that the whole cost and expense of conducting the business as aforesaid is added to the cost of the articles that are produced and sold, and hence, in the long run, such costs and expenses are borne by the public; that is, by the consumers of the articles produced. The purpose of such an act, therefore, is to protect the employee and those dependent upon him, and in case of his serious injury or death to provide adequate means for the support of those dependent upon him. In view, therefore, that in case of total disability or death of the employee his dependents might become the objects of public charity, such a calamity is avoided by requiring the business or enterprise to provide for such dependents, with the right of the employer to add the amount that is paid out to the cost of producing and selling the product of such business or enterprise. The beneficent purpose of such acts are therefore apparent to all, and for that reason, if for no other, should receive a very liberal construction in favor of the injured employee. We are all united upon the proposition that in view of the purposes of such acts, in case there is any doubt respecting the right to compensation, such doubt should be resolved in

favor of the employee or his dependents as the case may be. Id. at 1021-1022. (Emphasis added)

The Labor Commission affirmed the Findings, Conclusions and determinations of the Administrative Law Judge. The Administrative Law Judge in rendering his Findings of Fact and Conclusions of Law properly applied this vital rule of construction. His Findings and Conclusions evidence a "liberal construction" and "resolution of doubt in favor of the claim".

Whenever any doubt or uncertainty appears in the record, it must be resolved in favor of the injured worker and the awarding of benefits. Petitioner totally disregards and ignores these well founded and detailed Findings, and instead asks this Court to construe the facts in a light most favorable to the insurance company and the defeating of benefits. In short, they completely disregard this underlying and fundamental principle of Utah Workers' Compensation law.

B. Petitioner Failed to Marshall the Evidence in Support of the Order.

If Petitioner wishes to challenge Findings of Fact, it is required to marshal all of the evidence supporting the Agency's finding and show that, despite supporting facts and all reasonable inferences that can be drawn therefrom, the findings are not supported by substantial evidence given the record as a whole. Hales Sand and Granite, Inc. v. Audit Division, 842 P.2d 887, 893 (Utah 1992). It has failed to do so. Petitioner failed to even mention significant Findings made by the Administrative Law Judge and the Commission.

Those omitted Findings are pointed out in Respondent's Statement of Facts

above.

As a result of Petitioner's failure to adequately marshal the facts and evidence it's Petition for Review should be dismissed.. To rule otherwise would allow any party on appeal to supplant Findings of the lower Court with that parties' own purported Findings without marshaling evidence or meeting the substantial evidence test.

C. The Commission Correctly Concluded that Mr. DeMille had a "Significant Impairment" as that Term is Used in the Permanent Total Disability Statute.

In order to be entitled to a finding of permanent total disability, the worker must prove a "compensable industrial injury" occurred, and that he has suffered some percentage of impairment. A finding of permanent total disability is appropriate when even a relatively small percentage of impairment caused by an industrial accident combined with other factors renders the Claimant unable to obtain employment. Zimmerman v. Industrial Commission, 785 P.2d 1127 (Utah App. 1989).

Utah Code Ann. §34A-2-102(8) (2000) defined "impairment" as a "a purely medical condition reflecting any anatomical or functional abnormality or loss. Impairment may be either temporary or permanent, industrial or nonindustrial." There can be little question that Mr. DeMille sustained a "significant" impairment as a result of his 1995 industrial accident. Prior to that time, despite a preexisting 17% whole person impairment which was relatively asymptomatic, Mr. DeMille was able

to work.

This is another area where the Petitioners have failed in their duty to marshal the evidence. The ALJ found and the Labor Commission concurred that “But for Mr. DeMille’s September 14, 1995 industrial accident, he likely would have continued relatively asymptomatic and employable for an indefinite period.” (R1 at 178). The medical records reflect, and the Labor Commission found, that Mr. DeMille’s accident at Thurston on September 14, 1995, “... produced scarring in muscle, spine and soft tissue, resulting in both anatomical and functional abnormality and loss.” (R1 at 223). The ALJ specifically found that “[T]he respondents’ (Petitioner’s herein) interference in Mr. DeMille’s medical care resulted in serious permanent exacerbations to Mr. DeMille’s back problems.” (R1 at 178).

The Petitioner’s make much of the fact that Mr. DeMille’s impairment cannot be considered significant because it has never been rated by a physician. Utah Code Ann. §34A-2-413(1)(b)(i) only requires a “significant impairment,” not a “significant impairment rating.” The significance of Mr. DeMille’s impairment is reflected in the fact that Mr. DeMille’s injuries caused by the 1995 industrial accident took him from employability with a preexisting 17% whole person impairment to permanent total disability.

D. The Commission Correctly Determined that Mr. DeMille’s September 14, 1995 Industrial Injury was the Direct Cause of his Permanent Total Disability.

Utah Code Annotated §34A-2-413 (1)(b)(iii) provides that:

(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

- (i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
- (ii) the employee is permanently totally disabled; and
- (iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability. (Emphasis added).

Mr. DeMille does not take issue with Thurston Cable's definition of the term "direct cause" as "generally synonymous with the terms 'primary cause', 'real cause', 'prepondering cause' and even 'proximate cause'" (Respondent's Brief at 28 and cases cited therein).

In this case it is clear that Mr. DeMille had prior injuries to his back. That is not unusual for an employee of his age and with his work history. He did in fact already have a 17% whole person impairment for his low back prior to his September 14, 1995 industrial accident. (R1 at 122). Despite those limitations Mr. DeMille was able to perform his job functions with Thurston Cable and remained gainfully employed. (R1 at 222-23).

Administrative Law Judge Benjamin A. Sims appointed a Medical Panel comprised of Dr. Madison Thomas, neurologist and Dr. Glen Momberger, an orthopedic surgeon. On June 19, 1997 the Panel issued its Report. (R3 at 436-441). In relevance here, the Panel specifically found as follows:

Had it not been for the initial injury in 1985, the petitioner's problems would undoubtedly been made less severe, but likewise had it not been for the significant injury on 14 September 1995, he might quite likely have continued relatively asymptomatic for an indefinite period. Since the more recent injury produced a significant aggravation of the back problem, the panel will leave it to the ALJ to determine the legal responsibility for further treatment of the condition. (R3 at 440).

There is no evidence in the record that Thurston Cable filed any Objection to the Medical Panel Report, despite the requirements of Utah Code Ann. §34A-2-601 (2002). In his 1997 Order Judge Sims adopted the report of the Medical Panel and found that on September 14, 1995, Mr. DeMille in fact injured his low back and left leg when he fell off a front-end loader.

Thurston Cable assembled a consultative Medical Panel composed of neurologists Dr. Moress and Dr. Scott Knorp. On October 26, 1999, that Panel essentially corroborated the conclusions reached by the Medical Panel. (R3 at 400).

Judge La Jeunesse specifically found that:

Judge Sims' 1997 Order conclusively confirmed that the 1995 industrial accident caused Mr. DeMille some back and left leg problems contrary to the opinions rendered by the respondents' medical panels. The preponderance of the medical evidence established that Mr. DeMille suffered ongoing low back pain and left leg radiculopathy in part due to permanent aggravations caused by the 1995 accident. The undisputed medical evidence in the case verified that Mr. DeMille also suffered some spinal, soft tissue damage from infections accompanying the stimulator implant. No dispute existed that Freemont Comp's requirement of a two stage procedure for the stimulator implant caused Mr. DeMille's spinal infections that accompanied the stimulator. (R1 at 25).

The Labor Commission in its Order Denying Motions for Review/Remand

specifically found that:

Thurston's second argument is that Mr. DeMille failed to meet §34A-2-413(1)(b)(iii)'s requirement that 'the industrial accident ... was the direct cause of the employee's permanent total disability.' In considering this argument, the Commission notes Mr. DeMille was able to work prior to his accident at Thurston, but after the accident the resulting injuries and consequences of medical treatment left him unable to work, except for relatively short and unsuccessful efforts to rejoin the workforce. Mr. DeMille's inability to work as a result of the Thurston accident is confirmed by the medical evidence. Thus, Mr. DeMille's accident at Thurston is the direct cause of his permanent total disability. (R1 at 223-24).

The overwhelming weight of the undisputed evidence is that Mr. DeMille's 1995 industrial injury was the direct cause of his permanent total disability. Petitioners in their Statement of Facts omit the significant medical evidence cited above, and thus they again fail in their duty to marshal the evidence.

CONCLUSION/STATEMENT OF RELIEF SOUGHT

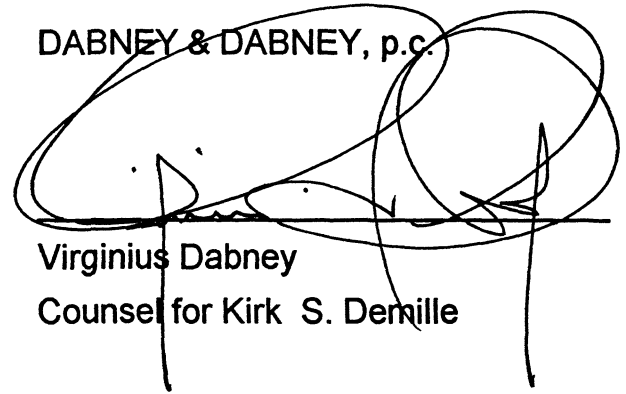
The Order below from which Petitioner seeks judicial review is not a final Order and is thus not subject to judicial review. Petitioner has failed to marshal the facts and evidence in support of the award; however, the overwhelming weight of the facts and evidence demonstrate that Mr. DeMille was in fact entitled to a tentative Finding of Permanent Total Disability.

Respondent respectfully requests that the tentative Finding of Permanent Total Disability be upheld and that this matter be remanded to the Administrative Law Judge to complete the adjudication of Mr. DeMille's claim for permanent total

disability compensation, and also to rule upon the issue of attorneys fees for Mr. DeMille's counsel.

DATED this 18th day of November, 2005.

DABNEY & DABNEY, p.c.

A large, stylized handwritten signature in black ink, consisting of several overlapping loops and a long vertical stroke on the right side, positioned over the printed name and title.

Virginius Dabney

Counsel for Kirk S. Demille

CERTIFICATE OF SERVICE

I hereby certify that on the 18th day of November, 2005, a copy of the foregoing BRIEF OF RESPONDENT KIRK S. DEMILLE was hand-delivered and/or mailed, as follows:

UTAH COURT OF APPEALS
450 South State Street - 5TH Floor
P.O. Box 140230
Salt Lake City, Utah 84111-0230

(1) original and (7) copies

Mr. Alan L. Hennebold
UTAH LABOR COMMISSION
Post Office Box 146600
Salt Lake City, Utah 84114-6600

(2 copies)

Mr. Mark D. Dean
Ms. Kristy L. Bertelsen
BLACKBURN & STOLL
77 West 200 South Suite #400
Salt Lake City, Utah 84101-1609

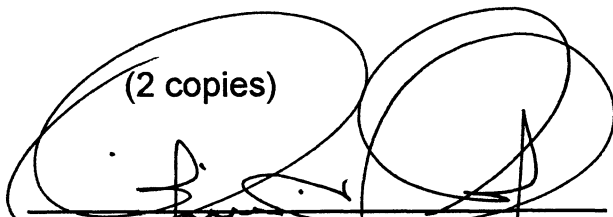
(2 copies)

Mr. Kirk S. DeMille
619 South 1100 East, #6
St. George, Utah 84790

(1 copy)

File Copies

(2 copies)



VIRGINIUS DABNEY
Counsel for Kirk S. Demille

the member. This Subsection (5) does not apply to the items listed in Subsection (4)(b)(iv).

(6) (a) For any permanent impairment caused by an industrial accident that is not otherwise provided for in the schedule of losses in this section, permanent partial disability compensation shall be awarded by the commission based on the medical evidence.

(b) Compensation for any impairment described in Subsection (6)(a) shall, as closely as possible, be proportionate to the specific losses in the schedule set forth in this section.

(c) Permanent partial disability compensation may not:

(i) exceed 312 weeks, which shall be considered the period of compensation for permanent total loss of bodily function; and

(ii) be paid for any permanent impairment that existed prior to an industrial accident.

(7) The amounts specified in this section are all subject to the limitations as to the maximum weekly amount payable as specified in this section, and in no event shall more than a maximum of 66-2/3% of the state average weekly wage at the time of the injury for a total of 312 weeks in compensation be required to be paid. 1997

34A-2-413. Permanent total disability — Amount of payments — Rehabilitation.

(1) (a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section.

(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of evidence that:

(i) the employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;

(ii) the employee is permanently totally disabled; and

(iii) the industrial accident or occupational disease was the direct cause of the employee's permanent total disability.

(c) To find an employee permanently totally disabled, the commission shall conclude that:

(i) the employee is not gainfully employed;

(ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;

(iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis for the employee's permanent total disability claim; and

(iv) the employee cannot perform other work reasonably available, taking into consideration the employee's age, education, past work experience, medical capacity, and residual functional capacity.

(d) Evidence of an employee's entitlement to disability benefits other than those provided under this chapter and Chapter 3, Utah Occupational Disease Act, if relevant, may be presented to the commission, but is not binding and creates no presumption of an entitlement under this chapter and Chapter 3, Utah Occupational Disease Act.

(2) For permanent total disability compensation during the initial 312-week entitlement, compensation shall be 66-2/3% of the employee's average weekly wage at the time of the injury, limited as follows:

(a) compensation per week may not be more than 85% of the state average weekly wage at the time of the injury;

(b) compensation per week may not be less than the sum of \$45 per week, plus \$5 for a dependent spouse, plus \$5 for each dependent child under the age of 18 years, up to a maximum of four dependent minor children, but not exceeding the maximum established in Subsection (2)(a) nor exceeding the average weekly wage of the employee at the time of the injury; and

(c) after the initial 312 weeks, the minimum weekly compensation rate under Subsection (2)(b) shall be 36% of the current state average weekly wage, rounded to the nearest dollar.

(3) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or before June 30, 1994:

(a) The employer or its insurance carrier is liable for the initial 312 weeks of permanent total disability compensation except as outlined in Section 34A-2-703 as in effect on the date of injury.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507 in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be reimbursed to the employer or its insurance carrier by the Employers' Reinsurance Fund and shall be paid out of the Employers' Reinsurance Fund's liability to the employee.

(d) After an employee has received compensation from the employee's employer, its insurance carrier, or the Employers' Reinsurance Fund for any combination of disabilities amounting to 312 weeks of compensation at the applicable permanent total disability compensation rate, the Employers' Reinsurance Fund shall pay all remaining permanent total disability compensation.

(e) Employers' Reinsurance Fund payments shall commence immediately after the employer or its insurance carrier has satisfied its liability under Subsection (3) or Section 34A-2-703.

(4) For claims resulting from an accident or disease arising out of and in the course of the employee's employment on or after July 1, 1994:

(a) The employer or its insurance carrier is liable for permanent total disability compensation.

(b) The employer or its insurance carrier may not be required to pay compensation for any combination of disabilities of any kind, as provided in this section and Sections 34A-2-410 through 34A-2-412 and Sections 34A-2-501 through 34A-2-507, in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate under Subsection (2).

(c) Any overpayment of this compensation shall be recouped by the employer or its insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(5) Notwithstanding the minimum rate established in Subsection (2), the compensation payable by the employer, its insurance carrier, or the Employers' Reinsurance Fund, after

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an employee has received compensation from the employer or the employer's insurance carrier for any combination of disabilities amounting to 312 weeks of compensation at the applicable total disability compensation rate, shall be reduced, to the extent allowable by law, by the dollar amount of 50% of the Social Security retirement benefits received by the employee during the same period.

(6) (a) A finding by the commission of permanent total disability is not final, unless otherwise agreed to by the parties, until:

(i) an administrative law judge reviews a summary of reemployment activities undertaken pursuant to Chapter 8, Utah Injured Worker Reemployment Act;

(ii) the employer or its insurance carrier submits to the administrative law judge a reemployment plan as prepared by a qualified rehabilitation provider reasonably designed to return the employee to gainful employment or the employer or its insurance carrier provides the administrative law judge notice that the employer or its insurance carrier will not submit a plan; and

(iii) the administrative law judge, after notice to the parties, holds a hearing, unless otherwise stipulated, to consider evidence regarding rehabilitation and to review any reemployment plan submitted by the employer or its insurance carrier under Subsection (6)(a)(ii).

(b) Prior to the finding becoming final, the administrative law judge shall order:

(i) the initiation of permanent total disability compensation payments to provide for the employee's subsistence; and

(ii) the payment of any undisputed disability or medical benefits due the employee.

(c) The employer or its insurance carrier shall be given credit for any disability payments made under Subsection (6)(b) against its ultimate disability compensation liability under this chapter or Chapter 3, Utah Occupational Disease Act.

(d) An employer or its insurance carrier may not be ordered to submit a reemployment plan. If the employer or its insurance carrier voluntarily submits a plan, the plan is subject to Subsections (6)(d)(i) through (iii).

(i) The plan may include retraining, education, medical and disability compensation benefits, job placement services, or incentives calculated to facilitate reemployment funded by the employer or its insurance carrier.

(ii) The plan shall include payment of reasonable disability compensation to provide for the employee's subsistence during the rehabilitation process.

(iii) The employer or its insurance carrier shall diligently pursue the reemployment plan. The employer's or insurance carrier's failure to diligently pursue the reemployment plan shall be cause for the administrative law judge on the administrative law judge's own motion to make a final decision of permanent total disability.

(e) If a preponderance of the evidence shows that successful rehabilitation is not possible, the administrative law judge shall order that the employee be paid weekly permanent total disability compensation benefits.

(7) (a) The period of benefits commences on the date the employee became permanently totally disabled, as determined by a final order of the commission based on the facts and evidence, and ends:

(i) with the death of the employee; or

(ii) when the employee is capable of returning to regular, steady work.

(b) An employer or its insurance carrier may provide or locate for a permanently totally disabled employee reasonable, medically appropriate, part-time work in a job earning at least minimum wage provided that employment may not be required to the extent that it would disqualify the employee from Social Security disability benefits.

(c) An employee shall fully cooperate in the placement and employment process and accept the reasonable, medically appropriate, part-time work.

(d) In a consecutive four-week period when an employee's gross income from the work provided under Subsection (7)(b) exceeds \$500, the employer or insurance carrier may reduce the employee's permanent total disability compensation by 50% of the employee's income in excess of \$500.

(e) If a work opportunity is not provided by the employer or its insurance carrier, a permanently totally disabled employee may obtain medically appropriate, part-time work subject to the offset provisions contained in Subsection (7)(d).

(f) (i) The commission shall establish rules regarding the part-time work and offset.

(ii) The adjudication of disputes arising under Subsection (7) is governed by Part 8, Adjudication.

(g) The employer or its insurance carrier shall have the burden of proof to show that medically appropriate part-time work is available.

(h) The administrative law judge may:

(i) excuse an employee from participation in any job that would require the employee to undertake work exceeding the employee's medical capacity and residual functional capacity or for good cause; or

(ii) allow the employer or its insurance carrier to reduce permanent total disability benefits as provided in Subsection (7)(d) when reasonable, medically appropriate, part-time employment has been offered but the employee has failed to fully cooperate.

(8) When an employee has been rehabilitated or the employee's rehabilitation is possible but the employee has some loss of bodily function, the award shall be for permanent partial disability.

(9) As determined by an administrative law judge, an employee is not entitled to disability compensation, unless the employee fully cooperates with any evaluation or reemployment plan under this chapter or Chapter 3, Utah Occupational Disease Act. The administrative law judge shall dismiss without prejudice the claim for benefits of an employee if the administrative law judge finds that the employee fails to fully cooperate, unless the administrative law judge states specific findings on the record justifying dismissal with prejudice.

(10) (a) The loss or permanent and complete loss of the use of both hands, both arms, both feet, both legs, both eyes, or any combination of two such body members constitutes total and permanent disability, to be compensated according to this section.

(b) A finding of permanent total disability pursuant to Subsection (10)(a) is final.

(11) (a) An insurer or self-insured employer may periodically reexamine a permanent total disability claim, except those based on Subsection (10), for which the insurer or self-insured employer had or has payment responsibility to determine whether the worker remains permanently totally disabled.

(b) Reexamination may be conducted no more than once every three years after an award is final, unless good

cause is shown by the employer or its insurance carrier to allow more frequent reexaminations.

- (c) The reexamination may include:
 - (i) the review of medical records;
 - (ii) employee submission to reasonable medical evaluations;
 - (iii) *employee submission to reasonable rehabilitation evaluations and retraining efforts;*
 - (iv) employee disclosure of Federal Income Tax Returns;
 - (v) employee certification of compliance with Section 34A-2-110; and
 - (vi) employee completion of sworn affidavits or questionnaires approved by the division.

(d) The insurer or self-insured employer shall pay for the cost of a reexamination with appropriate employee reimbursement pursuant to rule for reasonable travel allowance and per diem as well as reasonable expert witness fees incurred by the employee in supporting the employee's claim for permanent total disability benefits at the time of reexamination.

(e) If an employee fails to fully cooperate in the reasonable reexamination of a permanent total disability finding, an administrative law judge may order the suspension of the employee's permanent total disability benefits until the employee cooperates with the reexamination.

(f) (i) Should the reexamination of a permanent total disability finding reveal evidence that reasonably raises the issue of an employee's continued entitlement to permanent total disability compensation benefits, an insurer or self-insured employer may petition the Division of Adjudication for a rehearing on that issue. The petition shall be accompanied by documentation supporting the insurer's or self-insured employer's belief that the employee is no longer permanently totally disabled.

(ii) If the petition under Subsection (11)(f)(i) demonstrates good cause, as determined by the Division of Adjudication, an administrative law judge shall adjudicate the issue at a hearing.

(iii) Evidence of an employee's participation in medically appropriate, part-time work may not be the sole basis for termination of an employee's permanent total disability entitlement, but the evidence of the employee's participation in medically appropriate, part-time work under Subsection (7) may be considered in the reexamination or hearing with other evidence relating to the employee's status and condition.

(g) In accordance with Section 34A-1-309, the administrative law judge may award reasonable attorneys fees to an attorney retained by an employee to represent the employee's interests with respect to reexamination of the permanent total disability finding, except if the employee does not prevail, the attorneys fees shall be set at \$1,000. The attorneys fees shall be paid by the employer or its insurance carrier in addition to the permanent total disability compensation benefits due.

(h) During the period of reexamination or adjudication if the employee fully cooperates, each insurer, self-insured employer, or the Employers' Reinsurance Fund shall continue to pay the permanent total disability compensation benefits due the employee.

(12) If any provision of this section, or the application of any provision to any person or circumstance, is held invalid, the remainder of this section shall be given effect without the invalid provision or application.

1997

34A-2-414. Benefits in case of death — Distribution of award to dependents — Death of dependents — Remarriage of surviving spouse.

(1) (a) The benefits in case of death shall be paid to one or more of the dependents of the decedent for the benefit of all the dependents, as may be determined by an administrative law judge.

(b) The administrative law judge may apportion the benefits among the dependents in the manner that the administrative law judge considers just and equitable.

(c) Payment to a dependent subsequent in right may be made, if the administrative law judge considers it proper, and shall operate to discharge all other claims.

(2) The dependents, or persons to whom benefits are paid, shall apply the same to the use of the several beneficiaries thereof in compliance with the finding and direction of the administrative law judge.

(3) In all cases of death when:

(a) the dependents are a surviving spouse and one or more minor children, it shall be sufficient for the surviving spouse to make application to the Division of Adjudication on behalf of that individual and the minor children; and

(b) all of the dependents are minors, the application shall be made by the guardian or next friend of the minor dependents.

(4) The administrative law judge may, for the purpose of protecting the rights and interests of any minor dependents the administrative law judge considers incapable of doing so, provide a method of safeguarding any payments due the minor dependents.

(5) Should any dependent of a deceased employee die during the period covered by weekly payments authorized by this section, the right of the deceased dependent to compensation under this chapter or Chapter 3, Utah Occupational Disease Act, shall cease.

(6) (a) If a surviving spouse, who is a dependent of a deceased employee and who is receiving the benefits of this chapter or Chapter 3 remarries, that individual's sole right after the remarriage to further payments of compensation shall be the right to receive in a lump sum the lesser of:

(i) the balance of the weekly compensation payments unpaid from the time of remarriage to the end of six years or 312 weeks from the date of the injury from which death resulted; or

(ii) an amount equal to 52 weeks of compensation at the weekly compensation rate the surviving spouse was receiving at the time of such remarriage.

(b) (i) If there are other dependents remaining at the time of remarriage, benefits payable under this chapter or Chapter 3, Utah Occupational Disease Act, shall be paid to such person as an administrative law judge may determine, for the use and benefit of the other dependents.

(ii) The weekly benefits to be paid under Subsection (6)(b)(i) shall be paid at intervals of not less than four weeks.

1997

34A-2-415. Increase of award to children and dependent spouse — Effect of death, marriage, majority, or termination of dependency of children — Death, divorce, or remarriage of spouse.

If an award is made to, or increased because of a dependent spouse or dependent minor child or children, as provided in this chapter or Chapter 3, Utah Occupational Disease Act, the award or increase in amount of the award shall cease at:

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3. Permanent partial or permanent total disability
compensation payable by the Employers' Reinsurance
Fund or the Uninsured Employers' Fund shall be due
and payable as soon as reasonably practical after an
order is issued.

R612-1-6. Issuance of Checks.

A. Any entity issuing compensation checks or drafts
must make those checks/drafts payable directly to the
injured worker and must mail them directly to the
last known mailing address of the injured worker,
with the following exceptions:

1. If the employer provides full salary to the injured
worker in return for the worker's compensation ben-
efits, the check may be mailed to the worker at the
place of employment;

2. If the employer coordinates other benefits with
the worker's compensation benefits, the check may be
mailed to the worker at the place of employment.

B In no case may the check be made out to the
employer.

C. Where attorney fees are involved, a separate
check should be issued to the worker's attorney in the
amount approved or ordered by the Commission,
unless otherwise directed by the Commission. Pay-
ment of the worker's attorney by issuing a check
payable to the worker and his attorney jointly consti-
tutes a violation of this rule.

R612-1-7. Acceptance/Denial of a Claim.

A. Upon receiving a claim for workers' compensa-
tion benefits, the insurance carrier or self-insured
employer shall promptly investigate the claim and
begin payment of compensation within 21 days from
the date of notification of a valid claim or the insur-
ance carrier or self-insured employer shall send the
claimant and the division written notice on a division
form or letter containing similar information, within
21 days of notification, that further investigation is
needed stating the reason(s) for further investigation.
Each insurance carrier or self-insured employer shall
complete its investigation within 45 days of receipt of
the claim and shall commence the payment of benefits
or notify the claimant and division in writing that the
claim is denied and the reason(s) why the claim is
being denied.

B. The payment of compensation shall be consid-
ered overdue if not paid within 21 days of a valid claim
or within the 45 days of investigation unless denied.

C. Failure to make payment or to deny a claim
within the 45 day time period without good cause
shall result in a referral of the insurance company to
the Insurance Department for appropriate disciplin-
ary action and may be cause for revocation of the
self-insurance certification for a self-insured em-
ployer. Good cause is defined as:

1. Failure by an employee claiming benefits to sign
requested medical releases;
2. Injury or occupational disease did not occur
within the scope of employment;
3. Medical information does not support the claim;
4. Claim was not filed within the statute of limita-
tions;
5. Claimant is not an employee of the employer
he/she is making a claim against;
6. Claimant has failed to cooperate in the investi-
gation of the claim;

7. A pre-existing condition is the sole cause of the
medical problem and not the claimed work-related
injury or occupational disease;

8. Tested positive for drugs or alcohol; or

9. Other - a very specific reason must be given.

D. If an insurance carrier or self-insured employer
begins payment of benefits on an investigation basis
so as to process the claim in a timely fashion, a later
denial of benefits based on newly discovered informa-
tion may be allowed.

R612-1-8. Insurance Carrier/Employer Liability.

A. This rule governs responsibility for payment of
workers' compensation benefits for industrial acci-
dents when:

1. The worker's ultimate entitlement to benefits is
not in dispute; but

2. There is a dispute between self-insured employ-
ers and/or insurers regarding their respective liability
for the injured worker's benefits arising out of sepa-
rate industrial accidents which are compensable under
Utah law.

B. In cases meeting the criteria of subsection A, the
self-insured employer or insurer providing workers'
compensation coverage for the most recent compensa-
ble injury shall advance workers' compensation ben-
efits to the injured worker. The benefits advanced
shall be limited to medical benefits and temporary
total disability compensation. The benefits advanced
shall be paid according to the entitlement in effect on
the date of the earliest related injury.

1. The self-insured employer or insurance carrier
advancing benefits shall notify the non-advancing
party(s) within the time periods as specified in rule
R612-1-7, that benefits are to be advanced pursuant to
this rule.

2. The self-insured employers or insurers not ad-
vancing benefits, upon notification from the advanc-
ing party, shall notify the advancing party within 10
working days of any potential defenses or limitations
of the non-advancing party(s) liability.

C. The parties are encouraged to settle liabilities
pursuant to this rule, however, any party may file a
request for agency action with the Commission for
determination of liability for the workers' compensa-
tion benefits at issue.

D. The medical utilization decisions of the self-
insured employer or insurer advancing benefits pur-
suant to this rule shall be presumed reasonable with
respect to the issue of reimbursement.

R612-1-9. Compensation Agreements.

A. An applicant, insurance company, and/or em-
ployer may enter into a compensation agreement for
the purpose of resolving a worker's compensation
claim. Compensation agreements must be approved
by the Commission. The compensation agreement
must be that contained on Form 019 of the Commis-
sion forms and shall include the following informa-
tion:

1. Signatures of the parties involved;
2. Form 122 - Employer's First Report of Injury;
3. Doctor's report of impairment rating;
4. Form 141 - Payment of Benefits Statement.

B. Failure to provide any of the above documenta-
tion and forms may result in the return of the com-
pensation agreement to the carrier or self-insured
employer without approval.

R612-1-10. Permanent Total Disability.

A. This rule applies to claims for permanent total
disability compensation under the Utah Workers'
Compensation Act.

1. Subsection B applies to permanent total disability claims arising from accident or disease prior to May 1, 1995.

2. Subsection C applies to permanent total disability claims arising from accident or disease on or after May 1, 1995.

B. For claims arising from accident or disease on or after July 1, 1988 and prior to May 1, 1995, the Commission is required under Section 34A-2-413, to make a finding of total disability as measured by the substance of the sequential decision-making process of the Social Security Administration under Title 20 of the Code of Federal Regulations, amended April 1, 1993. The use of the term "substance of the sequential decision-making process" is deemed to confer some latitude on the Commission in exercising a degree of discretion in making its findings relative to permanent total disability. The Commission does not interpret the code section to eliminate the requirement that a finding by the Commission in permanent and total disability shall in all cases be tentative and not final until rehabilitation training and/or evaluation has been accomplished.

1. In the event that the Social Security Administration or its designee has made, or is in the process of making, a determination of disability under the foregoing process, the Commission may use this information in lieu of instituting the process on its own behalf.

2. In evaluating industrial claims in which the injured worker has qualified for Social Security disability benefits, the Commission will determine if a significant cause of the disability is the claimant's industrial accident or some other unrelated cause or causes.

3. To make a tentative finding of permanent total disability the Commission incorporates the rules of disability determination in 20 CFR 404.1520, amended April 1, 1993. The sequential decision making process referred to requires a series of questions and evaluations to be made in sequence. In short, these are:

a. Is the claimant engaged in a substantial gainful activity?

b. Does the claimant have a medically severe impairment?

c. Does the severe impairment meet or equal the duration requirement in 20 CFR 404.1509, amended April 1, 1993, and the listed impairments in 20 CFR Subpart P Appendix 1, amended April 1, 1993?

d. Does the impairment prevent the claimant from doing past relevant work?

e. Does the impairment prevent the claimant from doing any other work?

4. After the Commission has made a tentative finding of permanent total disability:

a. In those cases arising after July 1, 1994, the Commission shall order initiation of payment of permanent total disability compensation;

b. the Commission shall review a summary of reemployment activities undertaken pursuant to the Utah Injured Worker Reemployment Act, as well as any qualified reemployment plan submitted by the employer or its insurance carrier; and

c. unless otherwise stipulated, the Commission shall hold a hearing to consider the possibility of rehabilitation and reemployment of the claimant pending final adjudication of the claim.

5. After a hearing, or waiver of the hearing by the parties, the Commission shall issue an order finding or denying permanent total disability based upon the preponderance of the evidence and with due consider-

ation of the vocational factors in combination with the residual functional capacity which the commission incorporates as published in 20 CFR 404 Subpart P Appendix 2, amended April 1, 1993.

C. For permanent total disability claims arising on or after May 1, 1995, Section 34A-2-413 requires a two-step adjudicative process. First, the Commission must make a preliminary determination whether the applicant is permanently and totally disabled. If so, the Commission will proceed to the second step, in which the Commission will determine whether the applicant can be reemployed or rehabilitated.

1. First Step - Preliminary Determination of Permanent Total Disability: On receipt of an application for permanent total disability compensation, the Adjudication Division will assign an Administrative Law Judge to conduct evidentiary proceedings to determine whether the applicant's circumstances meet each of the elements set forth in Subsections 34A-2-413(1)(b) and (c).

(a) If the ALJ finds the applicant meets each of the elements set forth in Subsections 34A-2-413(1)(b) and (c), the ALJ will issue a preliminary determination of permanent total disability and shall order the employer or insurance carrier to pay permanent total disability compensation to the applicant pending completion of the second step of the adjudication process. The payment of permanent total disability compensation pursuant to a preliminary determination shall commence as of the date established by the preliminary determination and shall continue until otherwise ordered.

(b) A party dissatisfied with the ALJ's preliminary determination may obtain additional agency review by either the Labor Commissioner or Appeals Board pursuant to Subsection 34A-2-801(3). If a timely motion for review of the ALJ's preliminary determination is filed with either the Labor Commissioner or Appeals Board, no further adjudicative or enforcement proceedings shall take place pending the decision of the Commissioner or Board.

(c) A preliminary determination of permanent total disability by the Labor Commissioner or Appeals Board is a final agency action for purposes of appellate judicial review.

(d) Unless otherwise stayed by the Labor Commissioner, the Appeals Board or an appellate court, an appeal of the Labor Commissioner or Appeals Board's preliminary determination of permanent total disability shall not delay the commencement of "second step" proceedings discussed below or payment of permanent total disability compensation as ordered by the preliminary determination.

(e) The Commissioner or Appeals Board shall grant a request for stay if the requesting party has filed a petition for judicial review and the Commissioner or Appeals Board determine that:

(i) the requesting party has a substantial possibility of prevailing on the merits;

(ii) the requesting party will suffer irreparable injury unless a stay is granted; and

(iii) the stay will not result in irreparable injury to other parties to the proceeding.

2. Second Step - Reemployment and Rehabilitation: Pursuant to Subsection 34A-2-413(6), if the first step of the adjudicatory process results in a preliminary finding of permanent total disability, an additional inquiry must be made into the applicant's ability to be reemployed or rehabilitated, unless the parties waive such additional proceedings.

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employment and Rehabilitation: ion 34A-2-413(6), if the first step process results in a preliminary at total disability, an additional le into the applicant's ability to be ilitated, unless the parties waive eedings.

(a) The ALJ will hold a hearing to consider whether the applicant can be reemployed or rehabilitated.

(i) As part of the hearing, the ALJ will review a summary of reemployment activities undertaken pursuant to the Utah Injured Worker Reemployment Act;

(ii) The employer or insurance carrier may submit a reemployment plan meeting the requirements set forth in Subsection 34A-2-413(6)(a)(ii) and Subsections 34A-2-413(6)(d)(i) through (iii).

(b) Pursuant to Subsection 34A-2-413(4)(b) the employer or insurance carrier may not be required to pay disability compensation for any combination of disabilities of any kind in excess of the amount of compensation payable over the initial 312 weeks at the applicable permanent total disability compensation rate.

(i) Any overpayment of disability compensation may be recouped by the employer or insurance carrier by reasonably offsetting the overpayment against future liability paid before or after the initial 312 weeks.

(ii) An advance of disability compensation to provide for the employee's subsistence during the rehabilitation process is subject to the provisions of Subsection 34A-2-413(4)(b), described in subsection 2.(b) above, but can be funded by reasonably offsetting the advance of disability compensation against future liability normally paid after the initial 312 weeks.

(iii) To fund an advance of disability compensation to provide for an employee's subsistence during the rehabilitation process, a portion of the stream of future weekly disability compensation payments may be discounted from the future to the present to accommodate payment. Should this be necessary, the employer or insurance carrier shall be allowed to reasonably offset the amounts paid against future liability payable after the initial 312 weeks. In this process, care should be exercised to reasonably minimize adverse financial impact on the employee.

(iv) In the event the parties cannot agree as to the reasonableness of any proposed offset, the matter may be submitted to an ALJ for determination.

(c) Subsections 34A-2-413(7) and (9) require the applicant to fully cooperate in any evaluation or reemployment plan. Failure to do so shall result in dismissal of the applicant's claim or reduction or elimination of benefit payments including disability compensation and subsistence allowance amounts, consistent with the provisions of Section 34A-2-413(7) and (9).

(d) Subsection 34A-2-413(6) requires the employer or its insurance carrier to diligently pursue any proffered reemployment plan. Failure to do so shall result in a final award of permanent total disability compensation to the applicant.

(e) If, after the conclusion of the foregoing "second step" proceeding, the ALJ concludes that successful rehabilitation is not possible, the ALJ shall enter a final order for continuing payment of permanent total disability compensation. The period for payment of such compensation shall be commence on the date the employee became permanently and totally disabled, as determined by the ALJ.

(f) Alternatively, if after the conclusion of the "second step" proceeding, the ALJ concludes that successful rehabilitation and/or reemployment is possible, the ALJ shall enter a final order to that effect, which order shall contain such direction to the parties as the ALJ shall deem appropriate for successful implementation and continuation of rehabilitation and/or reemployment. As necessary under the particular circumstances of each case, the ALJ's final order shall

provide for reasonable offset of payments of any disability compensation that constitute an overpayment under Subsection 34A-2-413(4)(b).

(g) The ALJ's decision is subject to all administrative and judicial review provided by law.

D. For purposes of this rule, the following standards and definitions apply:

1. Other work reasonably available: Subject to medical restrictions and other provisions of the Act and rules, other work is reasonably available to a claimant if such work meets the following criteria:

a. The work is either within the distance that a resident of the claimant's community would consider to be a typical or acceptable commuting distance, or is within the distance the claimant was traveling to work prior to his or her accident;

b. The work is regular, steady, and readily available; and

c. The work provides a gross income at least equivalent to:

(1) The current state average weekly wage, if at the time of the accident the claimant was earning more than the state average weekly wage then in effect; or
(2) The wage the claimant was earning at the time of the accident, if the employee was earning less than the state average weekly wage then in effect.

2. Cooperation: As determined by an administrative law judge, an employee is not entitled to permanent total disability compensation or subsistence benefits unless the employee fully cooperates with any evaluation or reemployment plan. The ALJ will evaluate the cooperation of the employee using, but not limited to, the following factors: attendance, active participation, effort, communication with the plan coordinator, and compliance with the requirements of the vocational plan. In determining if these factors were met, the ALJ shall consider relevant changes in the employee's documents medical condition.

3. Diligent Pursuit: The employer or its insurance carrier shall diligently pursue the reemployment plan. The ALJ will evaluate the employer or insurance carrier's diligent pursuit of the plan using, but not limited to, the following factors: timely payment of expenses and benefits outline in the vocational plan, and as required by the educational institution providing the vocational training, communication with the employee, compliance with the requirements of the vocational plan, and timely modification of the plan as required by documented changes in the employee's medical condition.

4. Resolution of disputes regarding "cooperation" and "diligent pursuit": If a party believes another party is not cooperating with or diligently pursuing either the evaluations necessary to establish a plan, or the requirements of an approved reemployment or rehabilitation plan, the aggrieved party shall submit to the workers' compensation mediation unit an outline of the specific instances of non-cooperation or lack of diligence. Other parties may submit a reply. The Mediation Unit will promptly schedule mediation to reestablish cooperation among the parties necessary to evaluate or comply with the plan. If mediation is unsuccessful, a party may request the Adjudication Division resolve the dispute. The Adjudication Division will conduct a hearing on the matter within 30 days and shall issue a written decision with 10 days thereafter.

R612-1-11. Burial Expenses.

(1) Pursuant to Section 34A-2-418 if death results from an industrial injury or occupational disease,

Addendum B

Findings of Fact, Conclusions of Law and Order
Administrative Law Judge Richard M. La Jeunesse
November 6, 2002

UTAH LABOR COMMISSION

Case No. 20001059

KIRK S. DEMILLE,	*	
	*	FINDINGS OF FACT,
	*	
Petitioner,	*	CONCLUSIONS OF LAW,
	*	
vs.	*	AND ORDER
	*	
THURSTON CABLE CONSTRUCTION	*	Judge: Richard M. La Jeunesse
and/or FREEMNONT COMP.,	*	
	*	
Respondents,	*	
	*	

HEARING: Old Historic Courtroom 97 East St. George Blvd. St. George, Utah, on May 13, 2002, at 1:00 p.m. Said Hearing was pursuant to Order and Notice of the Commission.

BEFORE: Richard M. La Jeunesse, Administrative Law Judge.

APPEARANCES: The petitioner, Kirk DeMille, was present and represented by his attorney Virginius Dabney.

The respondents were represented by attorney Henry K. Chai II.

I. STATEMENT OF THE CASE

The petitioner, Kirk DeMille, filed an "Application For Hearing" with the Utah Labor Commission on June 5, 2001, and claimed entitlement to permanent total disability compensation. Mr. DeMille's claim for workers' compensation benefits derived from a low back injury he suffered in an industrial accident on September 14, 1995.

The respondents claimed that the September 14, 1995 industrial injury did not cause Mr. DeMille to become permanently and totally disabled. The respondents argued that Mr. DeMille suffered no permanent impairment as a result of the September 14, 1995 industrial accident beyond that already endured by Mr. DeMille prior to the September 14, 1995 event.

II. ISSUE.

Did the September 14 1995 industrial accident cause Kirk DeMille to become permanently and totally disabled?

III. COURSE OF PROCEEDINGS.

Mr. DeMille's claim for permanent total disability compensation derived from a low back injury he suffered in an industrial accident on September 14, 1995. Mr. DeMille had significant low back problems prior to September 15, 1995.

On August 7, 1987 Judge Richard Sumsion entered Findings of Fact, Conclusions of Law, and Order in Case No. 86000508 *Kirk DeMille v. Granger-Hunter Improvement District* (hereinafter the 1987 Order). Case No. 86000508 involved a low back injury Mr. DeMille suffered when he attempted to open a fire hydrant valve with an oversized pipe wrench while employed with the Granger-Hunter Improvement District on March 7, 1986.

In his 1987 Order Judge Sumsion held that Mr. DeMille sustained a 12.75% whole person impairment as a result of low back problems that preexisted the March 7, 1986 industrial accident. Judge Sumsion further found that Mr. DeMille sustained a 4.25% whole person impairment from the March 7, 1986 low back injury. In sum, as of March 7, 1986 Mr. DeMille endured a 17% whole person impairment consequent to low back problems.¹

On August 8, 1997 Judge Benjamin Sims entered Findings of Fact, Conclusions of Law, and Order in Case No. 96920 *Kirk DeMille v. Thurston Cable Construction et al* (hereinafter the 1997 Order). Case No. 96920 involved the same industrial accident and injury as the present case. Judge Sims found that on September 14, 1995 Mr. DeMille injured his low back and left leg when he fell off a front-end loader. Judge Sims determined that Mr. DeMille's September 14, 1995 injury arose out of and in the course of his employment with Thurston Cable Construction (Thurston).²

On November 9, 2000 Mr. DeMille filed an action principally concerned with his claim for additional temporary total disability compensation. On March 16, 2001 I denied a belated motion by Mr. DeMille to amend his claim for the inclusion of permanent total disability. On June 5, 2001, Mr. DeMille filed the present Application for Hearing on the issue of permanent total disability

¹ See also: November 10, 1987 Order Granting Motion for Review (this order only dealt with the issue concerning the medical necessity of surgery and in all other respects affirmed Judge Sumsion's 1987 Order). See also: January 19, 1989 Order for Reimbursement from the Employers' Reinsurance Fund.

² The Employers' First Report of Injury noted that on September 14, 1995 Mr. DeMille fell six feet from a Michigan Loader and landed on his left leg and back.

On January 2, 2002 I entered Findings of Fact, Conclusions of Law, and Order with respect to Mr. DeMille's claim for additional temporary total disability compensation related to the September 14, 1995 industrial accident with Thurston. [the January 2, 2002 Order]. In the January 2, 2002 Order I held that Both Mr. DeMille's treating physicians, Dr. Horne and Dr. Hagen, opined that Mr. DeMille was totally disabled with little hope for improvement. The opinions of Dr. Horne and Dr. Hagen categorized Mr. DeMille as permanently totally disabled which, as a matter of law precluded an award of ongoing temporary total disability benefits.

At the hearing on May 13, 2002 I accepted into evidence Exhibit's "P-1," "P-2," and Volume 3 of the Medical Exhibit accepted in the prior proceeding as Exhibit "J-1."³ On August 22, 2002, some three months after the close of evidence in this case, Mr. DeMille, through his attorney Mr. Dabney, attempted to submit some additional medical records into evidence. The respondents objected to the submission of the additional medical records. I hereby disallow the submission of the additional medical records filed by Mr. DeMille August 22, 2002 and give them no further consideration.

IV. FINDINGS OF FACT

A. Prior Orders.

To the extent that they are compatible with the present Order, I hereby adopt the findings set forth in the 1997 Order and the January 2, 2002 Order.

B. Employment.

The 1997 Order established that Thurston employed Mr. DeMille on September 14, 1995.

C. Compensation Rate.

The 1997 Order found that on September 14, 1995 Mr. DeMille was married with three dependent children. The 1997 Order established that on September 15, 1995 Mr. DeMille's compensation with Thurston equaled \$12.00 per hour, 40 hours per week, for an average weekly wage of \$480.00 per week. Mr. DeMille's wages determined by the 1997 Order confirmed \$335.00 per week as the appropriate permanent total disability compensation rate for the September 14, 1995 injury.

³At the hearing on April 3, 2001 the parties agreed to remove pages 53-58 from Volume I of Exhibit "J-1." At the hearing on May 13, 2002 I sustained objections to the admissibility of Exhibit's "P-3" and "P-4" into evidence.

D. Prior Low Back Injuries.

As discussed infra, Mr. DeMille suffered a 17% whole person impairment from low back injuries prior to the September 14, 1995 industrial accident.

E. The September 14, 1995 Industrial Injury.

The 1997 Order found that on September 14, 1995 Mr. DeMille injured his low back and left leg when he fell off a front-end loader. Mr. DeMille's September 14, 1995 injury arose out of and in the course of his employment with Thurston. For the sake of clarity, I repeat some of the facts set forth in January 2, 2002 Order.

On September 21, 1995 Dr. Jonathan Horne M.D. diagnosed Mr. DeMille with:

1. Radiculopathy left leg L5 nerve root.
2. Solid fusion L4-L5 vertebra with retained internal hardware two AD screws and cerclage wire.⁴
3. New strain/sprain contusion lumbosacral spine possible disc herniation. [Exhibit "J-1" Vol. II p. 294].

On September 28, 1995 a Lumbar Myelogram and Post Myelogram CT performed by Dr. Steven Davis M.D. disclosed:

The post myelogram CT images demonstrate again the post operative changes with solid appearing bone graft material posterolateral extending from L4 through S1. There is a very small central herniated nucleus pulposus at L5-S1 which indents the thecal sac but does not compress adjacent nerve roots. The remaining levels are unremarkable. [id. at 82].

On October 4, 1995 Dr. Horne observed that:

The myelogram and CT scan did not help us very much, it didn't show anything new. [id. at 297].

⁴ Mr. DeMille's fusion occurred prior to his September 14, 1995 industrial accident.

On October 17, 1995 Dr. Horne removed the hardware from Mr. DeMille's prior lumbar fusion which involved:

1. Exploration of lumbar spine fusion of L4-L5.
2. Removal of two screws, two washers, HO type, and removal of cerclage wire.
3. Saucerization of metallurgical osteitis. [id. at Vol. III].

On January 19, 1996 Dr. John Davis took flexion and extension view x-rays of Mr. DeMille's lumbar spine which revealed:

Post surgical changes lower lumbar spine. Associated degenerative changes lower lumbar spine. Facet joint narrowing L3-4 and L5-S1 is moderate. Severe narrowing L4-5 Facet may be post surgical in nature. [id. Vol. I at 83].

The respondents assembled a medical panel composed of Dr. Gerald Moress M.D., neurologist, Dr. Boyd Holbrook M.D., orthopedic surgeon and, Dr. Robert Burgoyne M.D., a psychiatrist. On March 10, 1996 the respondents' medical panel concluded:

The panel doubts that there is any underlying physical problem other than the pain disorder that Mr. DeMille shows. The panel felt the pain disorder was not related to the industrial incident⁵ but was characterological and related to events that pre-existed the industrial incident. We were unable to see any residual from the industrial incident. [id. Vol. II at 391].

On November 13, 1996 Dr. Horne noted:

An electromyogram and EMG was performed which showed positive radiculopathy, which is 100% evidence of continued problems with the nerve root components for the left sciatic nerve, which have been part of the patient's problem all along. [id. Vol. II at 313].

⁵ The September 14, 1995 industrial accident.

Judge Sims appointed a medical panel that consisted of Dr. Madison Thomas M.D., neurologist and, Dr. Glen Momberger M.D., orthopedic surgeon. On June 19, 1997 the Labor Commission medical panel concluded:

Had it not been for the initial injury in 1985, the petitioner's problems would undoubtedly been less severe, but likewise had it not been for the significant injury on 14 September 1995, he might quite likely have continued relatively asymptomatic for an indefinite period. Since the more recent injury produced a significant aggravation of the back problem the panel will leave it to the ALJ to determine the legal responsibility for further treatment of the condition. [id. Vol. II at 440].

In his 1997 Order Judge Sims adopted the report of the medical panel and found that on September 14, 1995 Mr. DeMille in fact injured his low back and left leg when he fell off the front-end loader.

On April 28, 1998 Dr. Horne operated on Mr. DeMille and inserted a: "thoracic spine dorsal epidural dorsal column stimulator." [id. Vol. I. at 6]. The stimulator became infected and Mr. DeMille endured a ten month course of hospitalizations and six surgical interventions. [id. Vol. I. at 12, 24, 29, 30, 39, and 94; Vol. II at 204, 206, and 268]. On February 19, 1999 Dr. Horne removed the stimulator. [id. Vol. I at 74]. Dr. Horne adamantly proclaimed that:

NONE OF THIS INFECTION WOULD HAVE OCCURRED HAD NOT THE INSURANCE COMPANY⁶ INSISTED ON A TWO STAGE PROCEDURE, WHICH ALLOWED AN INFECTION TO BE INTRODUCED INTO THE LEFT FLANK WHICH SIMMERED AND FINALLY RAISED IT'S HEAD AND BECAME A REAL INFECTION AND CELLULITIS LAST WEEK. [id. Vol. II at 332].

The respondents assembled a second medical panel composed of neurologists Dr. Moress and Dr. Scott Knorp. [id. Vol. II at 400]. On October 26, 1999 the respondents' second medical panel essentially corroborated the conclusions reached by the respondent's first medical panel. [id. at 400-402].

On November 8, 2000 Dr. Horne concluded:

He has continued severe low back and left leg pain with radiculopathy⁷ arachnoiditis, perispinal scarring from infection, soft tissue scarring in muscles and supporting tissues of the back. [id. Vol. II at 359].

⁶ Respondent Freemont Comp.

Judge Sims' 1997 Order conclusively confirmed that the 1995 industrial accident caused Mr. DeMille some serious back and left leg problems contrary to the opinions rendered by the respondents' medical panels. In the January 2, 2002 Order I found that:

[t]he preponderance of the medical evidence established that Mr. DeMille suffered ongoing low back pain and left leg radiculopathy in part due to permanent aggravations caused by the 1995 accident. The undisputed medical evidence in this case verified that Mr. DeMille also suffered some spinal, soft tissue damage from infections accompanying the stimulator implant. No dispute existed that Freemont Comp's requirement of a two stage procedure for the stimulator implant caused Mr. DeMille's spinal infections that accompanied the stimulator.

F. Permanent Total Disability.

1. Significant Impairment Caused by the September 14, 1995 Industrial Accident.

The respondents correctly observed that Mr. DeMille suffered from a 17% whole person impairment due to low back problems that pre-dated the September 14, 1995 industrial accident in the present case. The respondents then noted that Mr. DeMille received no additional impairment rating for the additional injuries caused by the September 14, 1995 industrial accident. Because nobody assigned a percentage of impairment to Mr. DeMille's injuries caused by the September 14, 1995 industrial accident, the respondents argued he did not suffer a significant impairment within the meaning of Utah Code Ann. § 35-1-67 (1)(b)(i) (1995).

The respondents overlooked several important conclusions contained in the determinative medical evidence in this case. On June 19, 1997 the Labor Commission Medical Panel concluded:

Had it not been for the initial injury in 1985, the petitioner's problems would undoubtedly been less severe, but likewise had it not been for the significant injury on 14 September 1995, he might quite likely have continued relatively asymptomatic for an indefinite period. Since the more recent injury produced a significant aggravation of the back problem the panel will leave it to the ALJ to determine the legal responsibility for further treatment of the condition. [id. Vol. II at 440].

In his 1997 Order Judge Sims adopted the findings of the Medical Panel which became the controlling medical evidence in this case. I in turn adopted Judge Sims findings in my January 2, 2002 Order.

My January 2, 2002 Order also recounted the respondents responsibility for the infections and six surgical procedures endured by Mr. DeMille related to his dorsal column stimulator. On April 28, 1998 Dr. Horne operated on Mr. DeMille and inserted a: "thoracic spine dorsal epidural dorsal column stimulator." [id. Vol. I. at 6]. The stimulator became infected and Mr. DeMille endured a ten month course of hospitalizations and six surgical interventions. [id. Vol. I. at 12, 24, 29, 30, 39, and 94; Vol. II at 204, 206, and 268]. On February 19, 1999 Dr. Horne removed the stimulator. [id. Vol. I at 74]. Dr. Horne adamantly proclaimed that:

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Following the infections associated with the spinal cord stimulator, his treating physicians rendered a series of opinions concerning Mr. DeMille's permanent total disability caused by the September 14, 1995 industrial injury. On June 21, 1999 Dr. Horne stated:

My opinion is he may very likely be as good as he's going to get.

He's certainly disabled and can do very little if anything. He can hardly sit in a car for a few minutes, can't sit up around the house for longer than ½ hour or an hour without laying back down. *He's not capable of any type of gainful employment and I see no light at the end of the tunnel that's going to change this.* [id. Vol. II at 346i][*emphasis added*].

On November 8, 2000 Dr. Horne stated:

S.S. has determined that he is totally disabled with which I agree. There is no way that he could sit/walk/be driven to a job or functionally be able to perform even a sedentary job for a predictable time of even forty hours. Any of this would aggravate his condition. [id. Vol. II at 359-360].

⁷ Respondent Freemont Comp.

On March 29, 2001 Dr. Horne opined that:

The patient absolutely is not going to improve. He may become and probably will become progressively more severe. [id. Vol. II at 360B].

He is totally disabled, is unable to sit, stand, walk for more than just a few minutes at a time, and has significantly increases of pain in performing those small intervals of activity. He uses a cane even to move around the home...At the very most, he's able to walk with a cane 2-3 blocks in extreme circumstances...In extreme circumstances, he can stand for 20-30 minutes, or sit for 45 to 90 minutes such as on some car rides or even going to a doctor's office. [id. Vol. II at 360C][emphasis added]

On April 24, 2001 Dr. Jerold Hagen M.D. opined regarding Mr. DeMille:

He has been unable to work or engage in any activity. He cannot sit for any length of time nor can he walk for any distance.

[M]r. DeMille is a patient who's life has been totally changed since 1998 and has been unable to work or perform any meaningful activity....It is doubtful to me that the patient will ever be able to hold down a meaningful job unless some resolution can be found for his incessant pain. [id. Vol. III at 456] [emphasis added].

Both Dr. Horne and Dr. Hagen professed that Mr. DeMille was totally disabled with little hope for improvement. The controlling findings of the June 19, 1997 Labor Commission Medical Panel determined that Mr. DeMille's September 14, 1995 industrial accident itself constituted a "significant injury," and "produced a significant aggravation" of Mr. DeMille's preexisting low back problems. [id. Vol. II at 440]. The Labor Commission Medical Panel also concluded that but for Mr. DeMille's September 14, 1995 industrial accident, he "likely (would) have continued relatively asymptomatic for an indefinite period." [id.].

Dr. Horne maintained that decisions made by respondents concerning Mr. DeMille's dorsal column stimulator resulted in his ten month course of hospitalizations, six surgical interventions, and much of the current problems suffered by Mr. DeMille. [id. Vol. II at 332]. Dr. Hagen opined that inter alia the resultant complications caused by the infections from dorsal column stimulator eventually led to Mr. DeMille's permanent total disability.

In summary, the established facts in this case revealed that between 1987, and September 14, 1995, Mr. DeMille remained relatively asymptomatic and able to work. The determinative facts of this case confirmed that but for Mr. DeMille's September 14, 1995 industrial accident, he likely would have continued relatively asymptomatic and employable for an indefinite period. The established facts of this case verified that Mr. DeMille's September 14, 1995 industrial accident itself constituted a significant injury, and produced a substantial aggravation of Mr. DeMille's preexisting low back problems. Further, the conclusive evidence in this case disclosed that the respondents' interference in Mr. DeMille's medical care resulted in serious, permanent exacerbations to Mr. DeMille's back problems. While not given a percentage impairment rating, Mr. DeMille's low back problems caused by the September 14, 1995 industrial accident took him from employability with a preexisting 17% whole person impairment to permanent total disability. Therefore, Mr. DeMille's September 14, 1995 injuries caused a significant impairment within the meaning of Utah Code Ann. § 35-1-67 (1)(b)(i) (1995).

2. Permanent Total Disability.

a. Gainful Employment.

Sometime after the September 14, 1995 industrial accident, Mr. DeMille worked for three months as a sales clerk at Hurst Sporting Goods (Hurst). Mr. DeMille terminated his employment with Hurst because of back pain.

After the September 14, 1995 industrial accident, Mr. DeMille also worked for six months with Danny Bundy Construction Company (Danny Bundy). Again, Mr. DeMille stopped working with Danny Bundy because of his back problems. Mr. DeMille held no gainful employment since his job with Danny Bundy. At the time of the hearing on May 13, 2002, Mr. DeMille remained unemployed.

b. Ability to do Basic Work Activities.

As set forth in Section IV.F.1. *infra*, the established medical evidence in this case confirmed that Mr. DeMille remained unable to do any type of work activities.

c. Ability to Perform Essential Functions of Work Activities for which Kirk DeMille Qualified prior to September 14, 1995.

As set forth in Section IV.F.1. *infra*, the established medical evidence in this case confirmed that Mr. DeMille's September 14, 1995 injuries caused him to become unable to do any type of work activities.

d. Other Work Reasonably Available.

As set forth in Section IV.F.1. *infra*, the established medical evidence in this case confirmed that Mr. DeMille remained unable to do any type of work activities.

e. Conclusion.

As set forth in Section IV.F.1. *infra*, the established medical evidence in this case confirmed Mr. DeMille's September 14, 1995 industrial accident, and the respondents medaling in Mr. DeMille's medical care for same, caused significant injuries and aggravations to preexisting injuries that left Mr. DeMille permanently and totally disabled.

3. Direct Cause of Kirk DeMille's Permanent Total Disability.

As cited multiple times herein, the opinion of the 1997 Labor Commission Medical Panel constituted the conclusive medical opinion as adopted by Judge Sims' 1997 Order and my own January 2, 2002 Order. The 1997 Labor Commission Medical panel determined that but for Mr. DeMille's September 14, 1995 industrial accident, he likely would have continued relatively asymptomatic and employable for an indefinite period. [id. Vol. II at 440]. The established facts of this case verified that Mr. DeMille's September 14, 1995 industrial accident itself constituted a significant injury, and produced a substantial aggravation of Mr. DeMille's preexisting low back problems. [id.]. Further, the respondents' interference in Mr. DeMille's medical care resulted in serious exacerbations of the problems caused by the September 14, 1995 industrial accident. [id. Vol. II at 332, and Vol. III. at 456]. In sum, the determinative medical evidence in this case established that Mr. DeMille's September 14, 1995 industrial accident, and the respondents medaling in his medical care for same, caused significant injuries and aggravations to preexisting problems that left Mr. DeMille permanently and totally disabled.

4. Date of Commencement of Permanent Total Disability.

Mr. DeMille worked for nine months after his September 14, 1995 industrial accident. [see: Section IV.F.2.a.]. Thereafter, Mr. DeMille remained unemployed, and permanently, totally disabled. Accordingly, the preponderance of the evidence in this case established the commencement date of Mr. DeMille's permanent total disability at June 15, 1996.

V. CONCLUSIONS OF LAW

A. Prior Orders.

To the extent that they are compatible with the present Order, I hereby adopt the conclusions of law set forth in the 1997 Order, and the January 2, 2002 Order.

B. Employment.

Thurston employed Mr. DeMille on September 14, 1995.

C. Compensation Rate.

On September 14, 1995 Mr. DeMille was married with three dependent children. Further, on September 15, 1995 Mr. DeMille's compensation with Thurston equaled \$12.00 per hour, 40 hours per week, for an average weekly wage of \$480.00 per week. Mr. DeMille's wages established \$335.00 per week as the appropriate permanent total disability compensation rate for the September 14, 1995 injury.

D. Prior Low Back Injuries.

Mr. DeMille suffered a 17% whole person impairment from low back injuries prior to the September 14, 1995 industrial accident.

E. The September 14, 1995 Industrial Injury.

On September 14, 1995 Mr. DeMille injured his low back and left leg when he fell off a front-end loader. Mr. DeMille's September 14, 1995 injury arose out of and in the course of his employment with Thurston.

The 1995 industrial accident caused Mr. DeMille serious back problems. Mr. DeMille suffered ongoing low back pain and left leg radiculopathy due to permanent aggravations caused by the 1995 accident. Mr. DeMille also suffered some spinal, soft tissue damage from infections accompanying the stimulator implant. Freemont Comp's requirement of a two stage procedure for the stimulator implant caused Mr. DeMille's spinal infections that accompanied the stimulator.⁸

⁸As stated by professor Larson: "It is now uniformly held that aggravation of the primary injury by medical or surgical treatment is compensable." A. LARSON and L. LARSON, LARSON'S WORKERS' COMPENSATION LAW § 10.09 [1] (2002). See also: Gunnison Sugar Co. v. Industrial

F. Permanent Total Disability.

Utah Code Ann. §35-1-67 (1) (1995) provides in pertinent part:

(a) In cases of permanent total disability resulting from an industrial accident or occupational disease, the employee shall receive compensation as outlined in this section:

(b) To establish entitlement to permanent total disability compensation, the employee has the burden of proof to show by a preponderance of the evidence that:

- (i) The employee sustained a significant impairment or combination of impairments as a result of the industrial accident or occupational disease that gives rise to the permanent total disability entitlement;
- (ii) The employee is permanently totally disabled; and
- (iii) the industrial accident or occupational disease was the direct cause of the employees permanent total disability.

(c) To find an employee permanently totally disabled, the commission shall conclude that:

- (i) the employee is not gainfully employed;
- (ii) the employee has an impairment or combination of impairments that limit the employee's ability to do basic work activities;
- (iii) the industrial or occupationally caused impairment or combination of impairments prevent the employee from performing the essential functions of the work activities for which the employee has been qualified until the time of the industrial accident or occupational disease that is the basis of the employee's permanent total disability claim; and
- (iv) the employee cannot perform other work reasonably available taking into consideration the employee's age, education, past work experience,, medical capacity, and residual functional capacity.

1. Significant Impairment Caused by the September 14, 1995 Industrial Accident.

Between 1987, and September 14, 1995, Mr. DeMille's preexisting low back problems remained relatively asymptomatic and he was able to work. But for Mr. DeMille's September 14, 1995 industrial accident, he likely would have continued relatively asymptomatic and employable for an indefinite period. Mr. DeMille's September 14, 1995 industrial accident itself constituted a significant injury, and produced a substantial aggravation of Mr. DeMille's preexisting low back problems. Further, the respondents' interference in Mr. DeMille's medical care resulted in serious, permanent exacerbations to Mr. DeMille's back problems.

While not given a percentage impairment rating, Mr. DeMille's low back problems caused by the September 14, 1995 industrial accident took him from employability with a preexisting 17% whole person impairment to permanent total disability. Therefore, Mr. DeMille's September 14, 1995 injuries caused a significant impairment within the meaning of Utah Code Ann. § 35-1-67 (1)(b)(i) (1995).⁹

2. Permanent Total Disability.

a. Gainful Employment.

At the time of the hearing on May 13, 2002, Mr. DeMille remained unemployed.

b. Ability to do Basic Work Activities.

Mr. DeMille remained unable to do any type of work activities.

c. Ability to Perform Essential Functions of Work Activities for which Kirk DeMille Qualified prior to September 14, 1995.

Mr. DeMille's September 14, 1995 injuries caused him to become unable to do any type of work activities.

⁹ Respondents' argument that a finding of "significant impairment" requires a rated impairment would lead to the unnecessary exercise of obtaining impairment ratings for all injuries causing permanent total disability regardless of the seriousness or nature of the injury.

d. Other Work Reasonably Available.

Mr. DeMille remained unable to do any type of work activities.

e. Conclusion.

Mr. DeMille's September 14, 1995 industrial accident, and the respondents medaling in Mr. DeMille's medical care for same, caused significant injuries and aggravations to preexisting injuries that left Mr. DeMille permanently and totally disabled.

3. Direct Cause of Kirk DeMille's Permanent Total Disability.

Mr. DeMille's September 14, 1995 industrial accident, and the respondents medaling in his medical care for same, caused significant injuries and aggravations to preexisting injuries that left Mr. DeMille permanently and totally disabled.

4. Date of Commencement of Permanent Total Disability.

The commencement date of Mr. DeMille's permanent total disability is June 15, 1996.

VI. ORDER

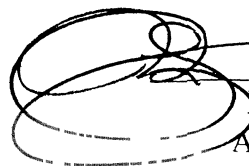
IT IS THEREFORE ORDERED that the respondents Thurston Cable Construction and/or Freemont Comp. shall pay Kirk DeMille subsistence payments in the amount of **\$335.00 per week** as of the date of this order and ongoing until further order of the Labor Commission pursuant to Utah Code Ann. §35-1-67 (6)(b) (1995). Further benefits to be determined after accomplishment of the procedures set forth in Utah Code Ann §35-1-67 (6)(a).

IT IS FURTHER ORDERED that the respondents Thurston Cable Construction and/or Freemont Comp. shall pay all medical expenses reasonably related to Kirk DeMille's back injuries incurred on September 14, 1995, according to the medical and surgical fee schedule of the Utah Labor Commission. The respondents Thurston Cable Construction and/or Freemont Comp. shall also pay travel allowances plus interest at eight percent (8%) per annum.

IT IS FURTHER ORDERED that if the respondents intend to submit a reemployment plan, the respondents shall file notice of such intent within thirty (30) days of the date of this order. The respondents shall file the reemployment plan within thirty (30) days after filing the notice of intent to file the plan, or within (60) days of the date of this order.

IT IS FURTHER ORDERED that by separate notice hearing shall be set with respect to any reemployment plan submitted by respondents.

Dated this 6th day of November 2002.



Richard M. La Jeunesse
Administrative Law Judge

NOTICE OF APPEAL RIGHTS

A party aggrieved by the decision may file a Motion For Review with the Adjudication Division of the Utah Labor Commission. The Motion for Review must set forth the specific basis for review and must be received by the Commission within 30 days from the date this decision is signed. Other parties may then submit their Responses to the Motion for Review within 20 days of the Motion for Review.

Any party may request that the Appeals Board of the Utah Labor Commission conduct the foregoing review. Such request must be included in the party's Motion for Review or its Response. If none of the parties specifically requests review by the Appeals Board, the review will be conducted by the Utah Labor Commissioner.


CERTIFICATE OF MAILING

I, Karla Rush, certify that I did mail by prepaid first class postage, except as noted below, a copy of the Findings Of Fact, Conclusions Of Law and Order in the case of DeMille v. Thurston Cable Construction et al Case No. 20001059 on the 6th day of November 2002, to the following:

KIRK DEMILLE
619 S 1100 E NO 6
ST GEORGE UT 84770

VIRGINIUS DABNEY ESQ
1060 S MAIN STE 2
ST GEORGE UT 84770

HENRY CHAI II ESQ
77 W 200 S STE 400
SALT LAKE CITY UT 84101 1609


Karla Rush

Addendum C

Order Denying Motion for Review/Order of Remand
Utah Labor Commissioner R. Lee Ellertson
May 30, 2003

UTAH LABOR COMMISSION

KIRK S. DEMILLE,

Applicant,

v.

**THURSTON CABLE CONSTRUCTION
and FREEMONT COMP.,**

Defendants.

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**ORDER DENYING
MOTIONS FOR REVIEW**

ORDER OF REMAND

Case No. 00-1059

All parties ask the Utah Labor Commission to review the Administrative Law Judge's decision regarding Kirk S. Demille's claim for permanent total disability compensation benefits under the Utah Workers' Compensation Act ("the Act": Title 34A, Chapter 2, Utah Code Ann.)

The Labor Commission exercises jurisdiction over this motion for review pursuant to Utah Code Ann. §63-46b-12, Utah Code Ann. §34A-2-801(3) and Utah Admin. Code R602-2-1.M.

BACKGROUND AND ISSUE PRESENTED

On September 14, 1995, Mr. DeMille was injured in an accident while working for Thurston Cable. He now seeks permanent total disability compensation from Thurston Cable and its workers' compensation insurance carrier, Freemont Comp. (referred to jointly as "Thurston" hereafter). After an evidentiary hearing, Judge La Jeunesse concluded Mr. DeMille was entitled to a preliminary finding of permanent total disability, subject to further proceedings to determine whether he can be reemployed or rehabilitated. Judge LaJeunesse ordered Thurston to begin paying subsistence benefits to Mr. DeMille as of November 6, 2002, the date of Judge La Jeunesse's decision.

Thurston requests Commission review of Judge LaJeunesse's decision on the grounds that: 1) Mr. DeMille did not sustain a "significant impairment" from his accident at Thurston; and, 2) the accident was not the direct cause of his permanent total disability. For his part, Mr. DeMille asks the Commission to review the date on which subsistence benefits should commence.

FINDINGS OF FACT

The Commission adopts the findings of fact set forth in Judge La Jeunesse's decision. As material to the issues raised by the parties' motions for review, the facts are summarized below.

At the time Mr. DeMille began working for Thurston, he had a 17% whole person impairment from prior back injuries. Nevertheless, he was able to perform his work duties at

ORDER DENYING MOTIONS FOR REVIEW/REMAND
KIRK S. DEMILLE
PAGE 2

Thurston and remain gainfully employed. Then, on September 14, 1995, Mr. DeMille fell off a front-end loader at Thurston. This accident significantly aggravated his preexisting back problems. He underwent back surgeries to treat his injuries, but developed a serious infection as a complication of the surgeries. The infection required even more medical care and, eventually, more surgery. All told, Mr. DeMille spent ten months in the hospital and had a total of six surgeries. As a result of all this, Mr. DeMille now has scarring in his spine, muscle and soft tissue of his back. Mr. DeMille is unable to sit, stand, or walk for more than a few minutes at a time. He cannot work or engage in any significant physical activity. His condition will not improve and will probably deteriorate.

DISCUSSION AND CONCLUSION OF LAW

There is no question that Mr. DeMille injured his back in a work-related accident at Thurston on September 14, 1995. Consequently, his injuries are compensable under the Utah workers' compensation system. See §34A-2-401 of the Act. However, in order to receive the specific benefit of permanent total disability compensation, Mr. DeMille must satisfy the conditions set forth in §34A-2-413 of the Act. Thurston argues that Mr. DeMille has failed to meet two of those conditions.

First, Thurston contends that Mr. DeMille has not met §34A-2-413(1)(b)(i)'s requirement of a "significant impairment or combination of impairments as a result of the industrial accident . . . that gives rise to the permanent total disability entitlement(.)" Section 34A-2-102(8) defines "impairment" as "a purely medical condition reflecting any anatomical or function abnormality or loss." Mr. DeMille's accident at Thurston on September 14, 1995, and the medical treatment he received as a result of the accident, produced scarring in muscle, spine and soft tissue, resulting in both anatomical and functional abnormality and loss. Thus, the record establishes that Mr. DeMille sustained an "impairment" within the meaning of the Act as a result of his accident at Thurston.

The Commission notes Thurston's argument that Mr. DeMille's impairment cannot be considered significant because it has never been rated by a physician. While such a rating would have been helpful in this case, and might be essential in other cases, §34A-2-413(1)(b)(i) only requires a "significant impairment," **not** a "significant impairment rating." In light of the facts and medical opinion submitted in this case, the Commission agrees with Judge LaJeunesse that Mr. DeMille has established a significant impairment.

Thurston's second argument is that Mr. DeMille failed to meet §34A-2-413(1)(b)(iii)'s requirement that "the industrial accident . . . was the direct cause of the employee's permanent total disability." In considering this argument, the Commission notes Mr. DeMille was able to work prior to his accident at Thurston, but after the accident the resulting injuries and consequences of medical treatment left him unable to work, except for relatively short and unsuccessful efforts to rejoin the workforce. Mr. DeMille's inability to work as a result of the Thurston accident is confirmed by the medical evidence. Thus, Mr. DeMille's accident at Thurston is the direct cause of his permanent

ORDER DENYING MOTIONS FOR REVIEW/REMAND
KIRK S. DEMILLE
PAGE 3

total disability.

Although Thurston cites the Utah Court of Appeals' recent decision in McKesson v. Lieberman, 41 P.3d 468 (Utah App. 2002) to support its argument, McKesson involved a non-work aggravation of a work-related injury. The Court of Appeals' analysis of that situation is not applicable to a case such as this, where there have been two separate work accidents, the last of which removes the worker from the workforce.

In light of the foregoing, the Commission concludes that Mr. DeMille has satisfied the requirements of §34A-2-413(1)(b), including subparts (i) and (iii). He is therefore entitled to a tentative determination of permanent total disability

The Commission now turns to Mr. DeMille's contention that he should receive retroactive subsistence benefits. As pointed out by Thurston, the Commission has addressed this issue before. The Commission has consistently held that, because the Act itself does not specify when the subsistence payments should begin, that question must be decided on a case by case basis by the ALJ, subject to review by the Commission or Appeals Board. In this case, the Commission finds no basis to disturb Judge LaJeunesse's order that Thurston begin payment of subsistence benefits to Mr. DeMille as of November 6, 2002.

Finally, Mr. DeMille contends that Judge LaJeunesse neglected to provide for payment of attorneys fees to Mr. DeMille's counsel. Because the Commission remands this matter to Judge LaJeunesse for additional proceedings, the Commission instructs Judge LaJeunesse to consider and rule upon this question of attorneys fees.

ORDER

The Commission affirms Judge LaJeunesse's decision in this matter and denies the motions for review of Thurston and Mr. DeMille. The Commission remands this matter to Judge LaJeunesse to complete the adjudication of Mr. DeMille's claim for permanent total disability compensation and also to rule upon the issue of attorneys fees for Mr. DeMille's counsel. It is so ordered.

Dated this 30th day of May, 2003.


R. Lee Ellertson
Utah Labor Commissioner

**ORDER DENYING MOTIONS FOR REVIEW/REMAND
KIRK S. DEMILLE
PAGE 4**

CERTIFICATE OF MAILING

I certify that a copy of the foregoing Order Denying Motions For Review/Remand in the matter of Kirk S. DeMille, Case No 00-1059, was mailed first class postage prepaid this 30th day of May, 2003, to the following:


KIRK S DEMILLE
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(address not in file)

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SALT LAKE CITY UT 84101-1609


Sara Danielson
Support Specialist
Utah Labor Commission

Orders\00-1059

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